In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1255

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for a writ of certiorari was filed on January 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the government failed to disclose evidence favorable to petitioner, in violation of the rule in *Brady* v. *Maryland*, 373 U.S. 83.

2. Whether the government knowingly used perjured testimony to convict petitioner.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having assaulted or intimidated a federal agent in the performance of his official duties, in violation of 18 U.S.C. 111. He was sentenced to imprisonment for two years and fined $5,000.[1] The conviction was affirmed on appeal, 423 F. 2d 993 (C.A. 5), and a petition for a writ of certiorari was denied, 398 U.S. 959.

The facts supporting the conviction are set forth in the government's memorandum in opposition to the earlier petition for a writ of certiorari (No. 1488, O.T., 1969). On September 30, 1966, petitioner and his brother, Joseph Marcello, returned from New York to New Orleans by plane. Two F.B.I. agents, Collins and Avignone, were assigned to observe and photograph petitioner's deplaning (Tr. 875).[2] On

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[1] The sentence was later reduced to six months, with two years probation and a fine of $5,000 (Pet. 5 n. 2).

[2] "Tr." refers to the transcript of proceedings at petitioner's first and second trials (the first resulted in a mistrial), a copy of which is on file in *Marcello* v. *United States*, No. 1488, O.T., 1969. "R" refers to the transcript of the hearing con-

arriving at the airport they observed a party of newspaper and television reporters and photographers waiting for petitioner; Avignone then decided to pose as a newspaper photographer (Tr. 838-841; 933). Petitioner's plane arrived at 9:30 p.m. He left the plane and, together with his brother and son, proceeded through the airport lobby to an upper automobile ramp. His party was followed closely by the newsmen, now including Avignone, while Collins, posing as a passenger, walked some 75 feet behind (Tr. 841; 920; 934).

On the ramp, one of the Marcellos turned and, yelling an obscentity, told the newsmen, "Haven't you got enough pictures?" All except Avignone backed away, and petitioner moved toward him; Collins moved forward to assist Avignone if necessary. Petitioner looked at Collins, said "I'm the boss here" and asked Collins if he were looking for trouble. Collins, now backed against the protective railing, replied that he could handle trouble (Tr. 844-846; 935-939; 1027-1029; 1314). Petitioner then jabbed at Collins, making some body contact (Tr. 846; 939-940; 1032-1034; 1293). Petitioner was immediately restrained by his brother and son and an airport policeman. The Marcellos then went to their car and left (Tr. 853; 940; 1035).

At trial, four defense witnesses testified concerning statements allegedly made by Agent Collins after the

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ducted on July 20-21, 1970, on petitioner's Motion for New Trial; we are lodging with the Court the complete transcript of this hearing, and our references are to this complete transcript.

incident. Three of the witnesses were close friends or long-time business associates of the petitioner; the fourth was an acquaintance of one of petitioner's attorneys. Each witness said Collins had admitted that petitioner had not hit him, that the incident was an accident or mistake, and that petitioner would surely win (Tr. 1096; 1115; 1223-1228; 1248; 1260). Collins testified that he had not made any such admissions or discussed the case with any of the four (Tr. 984, 987-992, 996).

Following the denial of his earlier petition for a writ of certiorari, petitioner filed a motion for a new trial, asserting that newly discovered evidence showed entrapment and claiming that the government failed to disclose information favorable to the defense in violation of *Brady* v. *Maryland*, 373 U.S. 83. At the hearing on this motion Joseph Sylvester, who was in charge of the F.B.I.'s New Orleans office on September 30, 1966, testified that prior to petitioner's arrival on that date he telephoned several local newspapers, a television station, and the Associated Press to ascertain whether there would be press coverage of the arrival. Sylvester stated that he did so to determine if he should assign additional agents to cover the arrival; if a large press turnout was expected, there would be little likelihood of trouble and thus no additional agents would be needed. In making each call Sylvester alluded to the arrival of a "prominent person", but did not identify petitioner or the flight he was taking (R. 204-212, 221). Both Collins and Avignone (the only agents on the scene at the airport) testified that they had no

knowledge of the telephone calls or that there would be press coverage at the airport (Tr. 876-877; R. 75-77, 197-198).

Another witness called by petitioner (William Perry Brown) related that on the day of the incident, he and Collins had attended a press party from noon to 3:30 p.m., and that Collins appeared inebriated when they left (R. 91-92, 97-98). Collins could not recall having attended any such party (R. 74-75, 79-80, 84-85, 186, 188-197). The agent who later that day assigned Collins to observe petitioner and the agent with him at the airport testified that Collins appeared normal when he received and carried out his assignment (R. 228-230; 240-242).

The district judge denied the motion for a new trial. The judge concluded that the "newly discovered" evidence concerning Collins' alleged intoxication would not, even if believed, have added to the case (R. 314-315), and that the news media contacts by Sylvester did not have any bearing on the issue of entrapment (R. 312-314).

Subsequently, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255, alleging (Pet. 14) that Collins had committed perjury (1) in denying at trial his alleged prior admissions that petitioner had not assaulted or intimidated him, and (2) in denying at the hearing on the motion for new trial that he recalled attending a press party or his alleged drunkenness. The district court denied the motion without a hearing.

Petitioner appealed from both the order denying a new trial and the Section 2255 order. The court of

appeals affirmed both rulings in a comprehensive opinion (Pet. App. A).

ARGUMENT

1. Petitioner, relying on *Brady* v. *Maryland*, *supra*, argues that the prosecution's failure to disclose Sylvester's communications with news media representatives before petitioner's arrival was an improper withholding of evidence favorable to the defenses of entrapment and provocation (Pet. 9-10). But this information was not material to these defenses.[3] The presence of the press—however it came about—could hardly be regarded under all the circumstances as calculated to induce petitioner to assault Collins. Neither Collins nor Avignone knew of Sylvester's phone calls, or that newsmen would be at the airport. The court of appeals properly found that petitioner was the aggressor and that nothing that occurred at the airport gave cause for petitioner's epithets and assault (Pet. App. A5-A6). Thus, the evidence of Sylvester's calls would not have helped petitioner's case materially.[4]

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[3] The government attorneys at petitioner's first trial, which resulted in a mistrial, knew of Sylvester's call but took the position that the issue of how the news media happened to be present was irrelevant. The district court stated in pretrial proceedings that it would defer ruling on the matter until trial, when it could determine if petitioner was entitled to the information (Tr. 344-347). Petitioner never pursued the matter.

[4] Petitioner's counsel conceded as much in the first pretrial proceeding in the case. When asked by the district judge if the fact that the F.B.I. had notified newsmen of petitioner's

2. In a second *Brady* attack, petitioner contends that the government's failure to disclose Collins' alleged drunkenness the day of the assault was also improper (Pet. 10-11). The court below rejected this claim because petitioner had not raised it in his motion for new trial (Pet. App. 6, n. 3); in any event it is without merit. The government cannot be faulted for not disclosing a subsequently alleged matter which it at all times has believed to be untrue. Indeed, the evidence at the new trial motion hearing showed that Collins was not intoxicated when he received his assignment or later at the time of the assault. The evidence submitted by petitioner relates only to the press party, which ended at 3:30 p.m., and not to Collins' condition some six hours later when the assault occured.

3. In his Section 2255 motion, petitioner claimed that Agent Collins perjured himself on five occasions at the trial and at the hearing on the new trial motion (see Pet. 14). The assertion concerning Collins' trial testimony is supported only by references to the trial testimony of defense witnesses, which the jury obviously disbelieved. The credibility issue had been emphasized by defense counsel's vigorous cross-examination of Collins at trial (Tr. 946-997). And the court below correctly held (Pet. App. A7) that even if there had been perjury at the new trial motion hearing it could not have affected petitioner's earlier con-

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arrival would indicate anything like entrapment, petitioner's counsel replied, "That in and of itself doesn't prove anything" (Tr. 346). As noted, counsel did not thereafter pursue the matter at either trial.

viction.[5] Since there were no questions raised which required a hearing, the district court properly denied petitioner's Section 2255 motion without one. See *Castellana* v. *United States*, 378 F. 2d 231 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1971.

[5] The trial judge was not impressed by Brown's testimony at that hearing as to Collin's alleged drunkenness at noon. That Collins in 1970 could not remember what had occurred at a luncheon in September 1966 hardly shows perjury.

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